Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

PRAVIN SANGHVI, M.D.,

Petitioner,

v.

ST. CATHERINE'S HOSPITAL, INC.,
f/k/a LAKESHORE HEALTH SYSTEMS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner brought this case alleging that respondent refused to enter into a contract for the sale of a practice owned by respondent because of petitioner's dark skin, in violation of 42 U.S.C.A. § 1981. During negotiations for the purchase of the practice, respondent's decision-maker asked petitioner if he felt comfortable rendering obstetric care to "white women" who are the primary patients of the practice, and the practice was subsequently sold to a group of white physicians at a substantially reduced price and under much better terms than were offered to petitioner. Nonetheless, the Seventh Circuit held that, despite the existence of direct evidence of racial animus, petitioner could not overcome respondent's proffered neutral reasons for selling to white physicians rather than to him, and so affirmed summary judgment.

The question presented is whether a plaintiff in a case of *direct* evidence of discriminatory animus must negate a defendant's proffered non-discriminatory reasons in order to survive a defense motion for summary judgment?

LIST OF PARTIES

St. Mary Medical Center, though named as a defendant in the original suit and included in the notice of appeal, was dismissed from this action by order of the district court on June 10, 1999 as per the parties' stipulations.

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Petitioner, Pravin Sanghvi, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the Seventh Circuit (App., *infra*, 1a - 16a) is reported at 258 F.3d 570. The court of appeals' decision denying rehearing and rehearing en banc (App., *infra*, 48a - 49a) is otherwise unreported. The decision of the district court granting defendant's motion for summary judgment (App., *infra*, 18a - 47a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 3, 2001, and denied rehearing and rehearing en banc on August 6, 2001. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C.A. § 1981 states in full:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

1. Petitioner, Dr. Sanghvi, is a dark-skinned native of the Indian sub-continent. He is a board-qualified obstetrician/gynecologist who has been practicing medicine in the United States since 1973. Over the years, he has maintained offices in Chicago, Illinois, and in several locations in the State of Indiana. He has been practicing his field of speciality in Northwest Indiana since 1993.

2. Respondent, St. Catherine's Hospital, Inc., is, for the purposes of this petition, a successor-in-interest to the corporation which owned and operated an obstetrics/gynecological practice ("the practice") located in St. Mary's Medical Center, itself owned by respondent, and located in Hobart, Lake County, Indiana. Milton Triana is St. Mary's Chief Executive Officer.

3. Triana announced in June 1997 that respondent would sell the practice located at St. Mary Medical Center. Dr. Sanghvi was among the physicians who was interested in purchasing the practice, and he began to negotiate with CEO Triana on the terms of such a sale. During a negotiation session for the purchase of that practice, CEO Triana asked Dr. Sanghvi the following question:

> Being an older, foreign-born physician, how comfortable do you feel dealing with young, white American women?

As shown below, the full implications of Triana's remark became clear after the practice was sold to another group of physicians composed of white, American-born men, at a substantially reduced price, and under much better terms than were offered to Dr. Sanghvi.

4. The only term for the purchase of the practice which respondent offered Dr. Sanghvi was $360,000 in cash, due and payable at closing. Triana rejected Dr. Sanghvi's suggestion of allowing him to pay the purchase price over time, insisting that the hospital could not countenance any such financing arrangement. In the meantime, respondent was actively negotiating with the eventual purchaser. That eventual purchaser, a corporation composed of white, American-born physicians, initially made the following offer to respondent: It would pay zero dollars, and offer nothing else of value, in exchange for which it would assume full ownership of the practice, lock, stock and barrel. Notwithstanding the absurdity of this offer, St. Catherine's continued to negotiate with this team of white physicians while ignoring Dr. Sanghvi.

In July 1997, this group of white physicians agreed to pay St. Catherine's $250,000 for the purchase of the practice and signed a letter of intent to that effect, though the date of closing was left open. Triana falsely told Dr. Sanghvi that the practice was sold, but Triana also said that Dr. Sanghvi would be contacted if the deal fell through. In October, the white physicians balked at paying the purchase price. St. Catherine's cheerfully obliged them by renegotiating the price down to $125,000. CEO Triana completely ignored the fact that Dr. Sanghvi had expressed interest in purchasing the practice. Triana also failed to solicit further contacts with Sanghvi, despite his prior assurance that he would resume negotiations with Dr. Sanghvi if the deal with the white physicians fell through.

The white physicians had assumed physical custody of the practice on July 7, and they were being compensated by respondent for covering the practice. Commencing on November 1, the white physicians were allowed to bill the patients (and their payers) directly, keeping 100% of the revenues generated by the practice. At about that time, the white physicians wrote a check to the respondent in the amount of $50,000 ostensibly as a down payment. That check, however, was never cashed by the respondent, and was in fact destroyed by respondent in late November. No replacement was issued for this check until January 5, 1998, when the white physicians and St. Catherine's finally closed on the sale. For a period of nine weeks, therefore, the white physicians had *de facto* ownership of the practice, were allowed to generate and keep all revenues to help defray the discounted price, and to do so without so much as having to make a down payment. Thus St. Catherine's gladly provided financing to the white physicians (*i.e.*, allowing them time to pay), while, for Dr. Sanghvi, it was a cash-on-the-barrel deal only, take it or leave it.

On November 6, 1997, long before the sale closed, and long before any binding documents were signed by the white physicians and the respondent, Dr. Sanghvi learned that the practice was being sold to the white physicians for substantially less than $200,000. Dr. Sanghvi made an immediate offer to CEO Triana to purchase the practice for $200,000 in cash. Dr. Sanghvi made it clear that he stood ready, willing, and able to pay this amount in full and in cash immediately. CEO Triana never even bothered to respond to Dr. Sanghvi's offer; the practice was sold two months later to the white physicians for $75,000 less than Dr. Sanghvi's cash offer.

Aside from selling the practice to the white physicians for nearly half what Dr. Sanghvi was willing to pay for it, St. Catherine's put Dr. Sanghvi at several disadvantages. The only purchase price St. Catherine's ever offered the dark-skinned Dr. Sanghvi was $360,000 in cash, three times the price it accepted from the white physicians. Dr. Sanghvi was never offered the opportunity of generating income from the practice in order to help defray the cost of purchasing same, as the white physicians were over a period of six months.[1] Dr. Sanghvi was never allowed the opportunity of occupying the practice over a period of nine weeks at no cost, nor of keeping 100% of the income generated by the practice in order to help defray the purchase price. Dr. Sanghvi was never allowed the opportunity of assuming control of the practice without having to pay a dime, so that he could pay for the practice over time. Indeed, any such financing arrangement

1. Indeed, St. Catherine's filed a counterclaim in this case seeking to recover what income Dr. Sanghvi did generate from having covered the practice over a period of five weeks in May and June 1997. That part of the case was remanded to State court, and is now set for trial on March 4, 2002.

was rejected by respondent when suggested by Dr. Sanghvi. These terms were only made available to the white physicians.

5. Dr. Sanghvi filed suit, claiming St. Catherine's had violated § 1981 by discriminating in failing to make a contract with him because of the colour of his skin and his national origin. The parties agreed that § 1981 protected Dr. Sanghvi from the discrimination he claimed to have suffered in this case. (App. 38a). Jurisdiction was vested in the trial court below, the United District Court for the Northern District of Indiana, Hammond Division, pursuant to 28 U.S.C.A. § 1331, federal-question jurisdiction, and 28 U.S.C.A. § 1343, jurisdiction over an action for the enforcement of a federal civil-rights statute. The parties consented to jurisdiction of a magistrate judge pursuant to 28 U.S.C.A. § 636(c)(1).

6. In granting respondent's motion for summary judgment, the district court failed to recognize that the invidious comment made by CEO Triana meant that this case was one of direct evidence of discriminatory intent. Instead, the magistrate judge found that the "statement [was] capable of being interpreted in many ways other than as evidence of discriminatory animus,"[2] and attributed this statement to the possibility that Triana was not "familiar" with "Dr. Sanghvi and his Asian-Indian culture." (App. 37a - 38a). Applying a *McDonnell Douglas* analysis, the district court granted summary judgment, dismissing Dr. Sanghvi's § 1981 claim.

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2. Of course, given the procedural posture of the case on summary judgment, the district court should have drawn all reasonable inferences in favour of Dr. Sanghvi, and should have assumed the statement evinced a discriminatory intent.

7. On appeal, the Seventh Circuit assumed "without deciding" that the Triana statement fell within the definition of direct evidence of discriminatory animus. It noted, in addition, that, to support an action, such a statement must be made by a decision-maker and must relate to the action at issue. It held that CEO Triana was the decision-maker as to the sale of this practice, and that the remark was made during the course of negotiations about the sale of the practice. (App. 8a).

Despite these findings, the court of appeals ruled that the case did not merit submission to trial by jury. The court analyzed the purportedly non-discriminatory reasons proffered by St. Catherine's for why it did not sell to Dr. Sanghvi. It accepted those justifications at face value, failed to consider the circumstances corroborating the inference of intent to discriminate, and affirmed summary judgment.

8. The Court of Appeals issued its opinion affirming summary judgment on July 3, 2001. Dr. Sanghvi filed a timely petition for rehearing with suggestion for rehearing en banc, which petition was denied on August 6, 2001.

9. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

That Dr. Sanghvi lives in Indiana and not in New York or Massachusetts ought not to be outcome determinative of whether he has his day in federal court to enforce his rights under a federal statute. Yet, because of the opinion below, there is now a split in these circuits as to how to analyze a direct evidence case. Review by this Court is appropriate to set a nation-wide standard in cases such as this one.

There are two bases for granting this petition. *First*, the Seventh Circuit's holding in this case is in direct, irreconcilable conflict with decisions from the First and Second Circuits. The court below holds that whether Dr. Sanghvi has direct evidence of an intent of the decision-maker to discriminate against him is irrelevant to whether he is entitled to trial by jury, because Dr. Sanghvi cannot overcome respondent's race-neutral justifications for refusing to sell the practice to him. The Second Circuit expressly rejects such an analysis, holding exactly the reverse: It is irrelevant to a case involving direct evidence that the defendant has a neutral explanation for its conduct, because such contradictory evidence requires resolution by a jury. The First Circuit also states that a direct evidence case requires a trial by jury. Certiorari is appropriate to resolve this conflict in the circuits.

Second, the court below wrongly uses a method of analysis created by this Court in *McDonnell Douglas v. Green* for cases of *indirect* evidence, requiring Dr. Sanghvi essentially to negate the respondent's proffered reasons for failing to enter into a contract of sale with him, even though Dr. Sanghvi's case is one of *direct* evidence. This "direct evidence plus" approach is a novel application of an analytical method never intended for use in the context of a direct evidence case. It is reminiscent of the "pretext plus" approach used by the Fifth Circuit in indirect evidence cases, which was reversed by this Court in *Reeves v. Sanderson Plumbing Products, Inc.* The Seventh Circuit's approach dramatically expands the burden of proof on a plaintiff such as Dr. Sanghvi in direct evidence cases, and has never been sanctioned by this Court. Review is appropriate on this significant question of law, which will have direct application to many areas of discrimination law.

I. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of Other Circuits On A Significant Question Of Law.

The Seventh Circuit's holding in this case that a trial was not warranted despite the existence of direct evidence of intentional discrimination conflicts with the rule of law in the First and Second Circuits. Had Dr. Sanghvi had the good fortune to live in those circuits, his case would have survived summary judgment.

As St. Catherine's did in this case, in *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1238 (2d Cir. 1995), the defendant proffered gender-neutral reasons, including a supposed corporate restructuring, in an attempt to explain why it had discharged the plaintiff in a sex-discrimination claim under Title VII. The Second Circuit pointed out that the justifications proffered by the defendant "hardly matter[ ]," because plaintiff's claim was one of direct evidence which did not involve the burden-shifting mechanism of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Cook*, 69 F.3d at 1239. The direct evidence was in the form of misogynistic remarks made by the plaintiff's supervisor which were generally derogatory about the role of women in the workplace, as well as comments derogatory of the plaintiff herself. *Cook*, 69 F.3d at 1239. The court noted that these remarks constituted direct evidence of an intent to discriminate, necessitating a trial. The Second Circuit reversed the district court's grant of summary judgment. *Cook*, 69 F.3d at 1239.

By contrast, the Seventh Circuit in this case has taken exactly the opposite view: Whether Sanghvi can make a case of direct evidence is irrelevant because respondent has

articulated non-discriminatory reasons for its behaviour. (App. 9a). The Seventh Circuit held that there was no genuine issue of material fact necessitating trial on the issue of intent to discriminate even though the defendant's CEO questioned the competence of the dark-skinned native of India to render obstetric/gynecological care to "young, white, American women;" even though the practice was sold to a group consisting of white American-born males; even though the practice was sold to those white males for $75,000 less than Dr. Sanghvi offered to pay; even though the white American-born males were allowed to occupy that practice for six months and generate income therefrom, while the dark-skinned Dr. Sanghvi was expected to pay immediately.

The facts of this case, in their broad outline, are so similar to *Cook* as to leave no doubt that in the Second Circuit summary judgment would have been reversed. The point of *Cook* is that, where the plaintiff has suffered a detriment, as Sanghvi has in this case (through the failure of St. Catherine's to sell the practice to him), there must be a trial if the plaintiff can establish by direct evidence an intention to discriminate. The decision of the Seventh Circuit in this case squarely rejects that position, and it is in irreconcilable conflict with *Cook*. Certiorari should be granted by the Supreme Court in order to resolve this conflict.

The Seventh Circuit's decision in this case also stands in direct conflict with the rule of law which obtains in the United States Court of Appeals for the First Circuit. Two recent cases from that court, cited but simply rejected by the Seventh Circuit, establish that, in the states within the First Circuit, when a plaintiff has direct evidence of discriminatory animus, the case must proceed to trial by jury. *Cardona Jimenez v. Bancomerico De Puerto Rico*, 174 F.3d 36, 40

(1st Cir. 1999); *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico*, 152 F.3d 17, 24 (1st Cir. 1998). Thus, Sanghvi, again, would have prevailed in the First Circuit (at least in resisting summary judgment).

Though somewhat more ambiguous, decisions from other circuits also suggest that Dr. Sanghvi's case would have survived summary judgment there. The Sixth Circuit, for instance, has stated in an age-discrimination case that age-related remarks referring directly to the worker support the inference of intentional age discrimination. *Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1025 (6th Cir. 1993). This statement suggests that plaintiffs having such direct evidence of an intent to discriminate would survive summary judgment in this Circuit, too. Language used by the Court of Appeals for the Eighth Circuit indicates that it is more likely to ally itself with the First and Second Circuits, rather than with the Seventh Circuit's decision in this case. *See Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) ("Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant", suggesting, *a priori*, that a case of direct evidence should survive summary judgment); cited approvingly in *Calvin v. Yellow Freight System, Inc.*, 218 F.3d 904, 907 (8th Cir. 2000).

Indeed, the opinion in this case contradicts the Seventh Circuit's own prior precedent. In *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990), a direct evidence case, Judge Posner held, "[I]f the inference of improper motive *can* be drawn, there must be a trial" (emphasis in original). The Seventh Circuit, however, rejected its own prior case law without any explanation for doing so. (App. 9a n.3).

Instead, the court below bolstered its opinion in this case by citing cases from the Fifth and Ninth Circuits, including *FDIC v. Henderson*, 940 F.2d 465 (9th Cir. 1991). (App. 9a). The court below stated that the *Henderson* court reversed a prior decision which would have required a trial in this case, referring specifically to *Eisenberg v. Insurance Company of North America*, 815 F.2d 1285 (9th Cir. 1987). The court below's assertion that *Henderson* reversed *Eisenberg* is far from clear, as a subsequent panel of the Ninth Circuit has cited *Eisenberg* approvingly.

Eisenberg held that if the non-moving party adduces direct evidence of a genuine issue of fact, such evidence may not be weighed against the moving party's conflicting evidence, but rather must be submitted to a jury for resolution. *Eisenberg*, 815 F.2d at 1289. But the Seventh Circuit mistakenly asserted that *Henderson* invalidated this principle. Recently, a Ninth Circuit panel, in a decision decided eight (8) years after *Henderson*, has cited *Eisenberg* approvingly for the very principle rejected by the Seventh Circuit. *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158-59 (9th Cir. 1999). Thus it is unclear what the rule of law is in the Ninth Circuit for adjudicating cases such as the one at bar.

At best, the Seventh Circuit, in affirming summary judgment against Dr. Sanghvi, stands with the Fifth and arguably the Ninth Circuits. But it stands directly opposed to the First and Second Circuits, where it is clear Dr. Sanghvi would have had his day in court. The Sixth and Eighth Circuits, to varying degrees, appear to come down on the side of allowing Dr. Sanghvi to proceed to trial. This split in the circuits is an appropriate basis for an exercise of this Court's certiorari discretion.

II. Certiorari Is Warranted Because The Seventh Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

As indicated in section I, above, the Seventh Circuit refused to allow this case to proceed to trial, despite the existence of direct evidence of an intent to discriminate, because respondent had articulated non-discriminatory reasons which the court held Dr. Sanghvi could not overcome. (App. 9a - 14a). This holding is a novel application of a device created by this Court in *McDonnell Douglas*, involving shifting burdens when the plaintiff has no direct evidence of discrimination. If the *McDonnell Douglas* requirement of negating a defendant's proffered reasons is to be engrafted into a direct evidence case, it will be virtually impossible for plaintiffs to prevail in direct evidence cases, which would actually be harder to prove than indirect evidence cases. If direct evidence of racial animus is insufficient to force a trial, what evidence can a plaintiff possibly adduce to overcome a defendant's summary judgment motion?

The burden-shifting framework, including giving the plaintiff the opportunity of demonstrating the pretext of defendant's proffered reasons, is a device developed by this Court to assist plaintiffs to overcome evidentiary hurdles when they are unable to produce direct evidence of intentional discrimination. It is more than a little ironic that that device has been turned into a shield by the court below, whereby even a plaintiff with direct evidence of racial animus needs to prove more.

If such a draconian change in the law is to occur, it should be the Supreme Court of the United States which announces the change.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140-141, 120 S. Ct. 2097, 2104-05, 147 L. Ed. 2d 105 (2000), this Court granted certiorari to determine whether the *McDonnell Douglas* burden-shifting method required a plaintiff to prove what is commonly called "pretext plus" after the defendant comes forward with a non-discriminatory explanation for its behaviour.[3] A unanimous Supreme Court held that it did not. *Reeves*, 530 U.S. at 154, 120 S. Ct. at 2112. A related issue arises in this case, one not yet decided by this Court, namely: Whether, in order to withstand summary judgment, a plaintiff in a direct evidence case may be compelled to produce evidence negating defendant's non-discriminatory reasons? This case, therefore, presents the issue of whether a plaintiff is required to produce "direct evidence plus."

In *Reeves*, this Court assessed the point at which a sufficiently reasonable inference of discrimination arises to require submission of a case to a jury. Of course, in indirect evidence cases such as *Reeves*, there is no "smoking gun" from which an inference of invidious discrimination arises. Thus this Court has fashioned the *McDonnell Douglas* approach in order to allow a plaintiff to raise the inference of intentional discrimination even though the defendant has been careful not to disclose his discriminatory animus overtly. Once a defendant articulates a legitimate non-discriminatory reason for its actions, the plaintiff then must discharge his burden of establishing the pretext of the proffered explanation or, at least, of creating a genuine issue of material fact as to

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3. That is to say, whether the plaintiff had to prove the falsity of the employer's reason and further establish that the real reason was discriminatory (hence "pretext plus"). *Reeves*, 530 U.S. at 140, 120 S. Ct. at 2105.

pretext. Having gone through that exercise, the plaintiff will have raised a sufficient inference of intentional discrimination to merit a trial.

In a *direct* evidence case such as Dr. Sanghvi's, this exercise is unnecessary. The inference of the intent to discriminate arises from CEO Triana's questioning of whether a dark-skinned native of India can render competent obstetric/gynecological services to the "white women" of Northwest Indiana. That statement is made by the decision-maker during discussions regarding the sale of the practice. Given this evidence, Dr. Sanghvi is not required to negate the evidence proffered by the defense for why its conduct was not discriminatory in order to survive summary judgment. Because Dr. Sanghvi is not relying on the *McDonnell Douglas* presumption to establish a *prima facie* case, respondent's purported justifications do not negate Sanghvi's *prima facie* case. Rather, there now exists direct evidence of discrimination and direct evidence of non-discrimination. The resolution of this conflict of evidence is for the jury.

The Seventh Circuit's requirement of "direct evidence plus" infects even its procedural analysis of this case. *Reeves* re-emphasizes that, in assessing whether to grant judgment as a matter of law, the reviewing court must draw all reasonable inferences in favour of the non-moving party. The court may not make credibility determinations or weigh the evidence, as these functions are quintessentially for the jury. *Reeves* dictates that the courts "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 150-51, 120 S. Ct. at 2110. Thus, once Reeves, making a prima facie case using the indirect method, came forward with evidence of pretext, the jury was required to hear and resolve the conflict in the

evidence, because evidence of pretext in an indirect evidence case raises the inference of discrimination. In a direct evidence case such as Dr. Sanghvi has, that inference arises from the discriminatory statement itself, as well as other corroborating evidence. Thus resolution of the issues by a jury is required.

Because the Seventh Circuit used "direct evidence plus", it weighed the defense evidence claiming to negate discrimination against Dr. Sanghvi's direct evidence of intentional discrimination, and resolved the conflict in favour of the defense. The court did its analysis, moreover, ignoring Dr. Sanghvi's additional proffered evidence corroborating his direct evidence case of an intent to discriminate: The sale of the practice to white, American-born physicians at one-third the price he had been offered and under far more favourable conditions than he was offered. The fact that the defense could proffer evidence which supported its case should have compelled a trial, not extinguished Dr. Sanghvi's Seventh Amendment right to trial by jury.

Further, the discussion in section I, above, suggests strongly that the First and Second Circuits would reject "direct evidence plus." The Fifth and arguably the Ninth Circuits side with the Seventh in requiring direct evidence plus, while the Sixth and Eighth Circuits appear to be leaning in favour of the First and Second Circuits' position.

CONCLUSION

The Seventh Circuit required Dr. Sanghvi to negate the defense's proffered justification to withstand summary judgment, even though he could establish the intent to discriminate through direct and corroborating evidence. The Seventh Circuit thus created a conflict with the First and Second Circuits. The analysis of the court below is an important innovation which will have wide implications in many fields of discrimination law, including Title VII, the ADA, the ADEA, certain areas of § 1983, as well as § 1981. Just as the Supreme Court rejected "pretext plus," it presumably would reject "direct evidence plus." For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED JULY 3, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 00-3613

PRAVIN SANGHVI, M.D.,

Plaintiff-Appellant,

v.

ST. CATHERINE'S HOSPITAL, INC., f/k/a LAKESHORE HEALTH SYSTEM, INC., and ST. MARY MEDICAL CENTER, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:98-CV-202-TS — **Theresa L. Springmann,** *Magistrate Judge.*

ARGUED MAY 7, 2001 — DECIDED JULY 3, 2001

Before FLAUM, *Chief Judge*, and RIPPLE and DIANE P. WOOD, *Circuit Judges.*

FLAUM, *Chief Judge.* Dr. Pravin Sanghvi appeals the adverse grant of summary judgment on his 42 U.S.C. § 1981

claim against St. Catherine's Hospital.[1] The plaintiff contends that he has produced sufficient direct and indirect evidence of discrimination to warrant a jury trial. For the reasons stated herein, we affirm the district court's decision.

I. Background

Dr. Sanghvi, who is dark-skinned and of Asian Indian ethnicity, is an obstetrician/gynecologist licensed in Indiana. In 1994, he began covering the practice of Dr. A.P. Bonaventura located at St. Mary Medical Center, which is affiliated with St. Catherine's Hospital, whenever Dr. Bonaventura was unavailable. When he covered the practice, Dr. Sanghvi billed the patients under his own name and provider number.

In October, 1996, Dr. Bonaventura sold his practice to the defendant, which was then known as Lakeshore Health System. After this sale, Dr. Bonaventura received a salary from the defendant and no longer had the authority to bill patients directly; rather, the defendant charged his patients for his services. Dr. Sanghvi continued to fill in for Dr. Bonaventura. Dr. Sanghvi was aware that Dr. Bonaventura no longer charged patients himself, and the defendant told Dr. Sanghvi that he would be paid an hourly wage for covering the practice, though apparently no amount was agreed upon. However, the plaintiff continued to bill the patients directly under his own name and provider number.

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1. St. Mary Medical Center, though named as a defendant in the original suit and included in the notice of appeal, was dismissed from this action by order of the district court on June 10, 1999 as per the parties' stipulations.

While Dr. Bonaventura knew this, the executives of St. Catherine's did not.

Dr. Bonaventura's declining health prevented him from continuing to perform his duties in May, 1997. On June 11, 1997, the chief executive officer of St. Mary Medical Center, Milton Triana, met with Dr. Sanghvi, who expressed an interest in purchasing Dr. Bonaventura's practice if he were unable to return. Once Dr. Bonaventura's inability to resume treating patients became a certainty, which was apparently a few days later, Triana offered to sell the assets to either Dr. Sanghvi or another physician who regularly covered the practice.

On June 19, Triana met with Dr. Sanghvi to discuss the sale of the practice. At this meeting, Triana asked Dr. Sanghvi: "Being an older, foreign-born physician, how comfortable do you feel dealing with young, white American women?"[2] Triana also told Dr. Sanghvi that the hospital did not want to finance the purchase of the practice.

The next day Triana wrote a letter offering to sell Dr. Sanghvi the practice for $360,000, payable in full at closing. This letter also indicated the defendant's expectation that the plaintiff would recruit another obstetrician/gynecologist to provide greater depth of coverage, though this was not a requirement of the sale. The number of women treated by the practice was important to the defendant because it

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2. Triana denies asking this question, but since the district court granted summary judgment to the defendant, we resolve all factual disputes in favor of Dr. Sanghvi. *Ghosh v. Indiana Dep't of Envtl. Management*, 192 F.3d 1087, 1094 n.2 (7th Cir. 1999).

expected that these patients would be referred to it by whomever purchased the practice. On June 24, Dr. Sanghvi responded with a counteroffer of twenty percent of the gross collection of the practice for the first year after he took over, to be paid monthly. This was rejected by the defendant. That same evening, Dr. Sanghvi and Triana had a discussion where the doctor offered to pay $250,000 for the practice in monthly installments over a one-year period. If Dr. Sanghvi failed to deliver the purchase price within the year, then any the payments he had made would be refunded. Triana seemed favorably inclined towards this arrangement, but said that he had to run it by a committee. Dr. Sanghvi made the same offer in writing on June 25. The defendant eventually rejected this offer.

Around this same time, in mid-to-late June, the Women's Wellness Center ("WWC") entered the picture. WWC employed a group of physicians, who were all white men, and its president at the time was Jeffrey Yessenow. A representative of WWC contacted the defendant about buying the practice. St. Catherine's responded that it would sell the practice for $360,000, with no financing by the hospital. In early July, the agents of the defendant and WWC began negotiations. Triana and other officers of St. Catherine's met with Dr. Sanghvi on July 1, informing him that they intended to sell to WWC since they were paying cash, but if that deal fell through they would accept Dr. Sanghvi's June 25 offer. On July 3, a letter of intent expressing the broad terms of the sale agreement between the defendant and WWC was drawn and executed. They settled on a purchase price of $250,000, to be paid in full at closing. However, over the coming months WWC continued to ask St. Catherine's to consider a lower price. On July 7, Dr. Sanghvi was told that the practice had been sold.

Appendix A

Dr. Sanghvi sent a letter dated August 2 to some of Dr. Bonaventura's former patients, purporting to explain why he did not take over the practice. The letter stated that Dr. Bonaventura's practice was simply sold to the higher bidder without regard for any other considerations. The letter went on to state that many of Dr. Bonaventura's old patients were coming to Dr. Sanghvi's office, and asked the recipients of the letter to share it with any of Dr. Bonaventura's former patients. Around the same time, Triana discovered that Dr. Sanghvi had billed Dr. Bonaventura's patients directly after the defendant purchased the practice. This allegedly diverted $38,000 of receivables belonging to the defendant to Dr. Sanghvi.

In part because of these events, by late September or early October the defendant acquiesced in a price reduction for WWC to $125,000. WWC then gave St. Catherine's a check for $50,000 with the remainder to be paid when the paperwork was formally completed, though the defendant claimed this check was accidentally destroyed. On November 1, WWC took over Dr. Bonaventura's practice.

Dr. Sanghvi and Triana spoke by telephone on November 6. When Triana told Dr. Sanghvi that the price WWC was paying for the practice was less than $200,000 and a final agreement had not been signed, Dr. Sanghvi offered to purchase the practice outright for up to $200,000 in cash. Triana did not respond. On January 5, 1998, St. Catherine's and WWC executed an asset transfer agreement and WWC paid the $125,000 purchase price in full.

Dr. Sanghvi brought suit in state court against the current defendant and others, alleging a violation of 42 U.S.C. § 1981

and various state law claims. The defendant removed the case to federal court based upon federal question jurisdiction and brought a counterclaim seeking damages under state law for Dr. Sanghvi's directly billing the practice's patients. The defendant moved for partial summary judgment on all of Dr. Sanghvi's claims. The district court granted the motion on the § 1981 cause of action and some of the state law claims. The court found that Dr. Sanghvi had not presented any direct evidence of discrimination and could not demonstrate that the defendant's reasons for refusing to sell the practice to him were pretextual. Having disposed of the federal claim, the district court remanded the remaining state laws claims to state court.

II. Discussion

42 U.S.C. § 1981 prohibits intentional discrimination on the basis of race or ethnicity concerning an activity protected by the statute. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987). Making a contract is such a protected activity, and Dr. Sanghvi claims that the defendant refused to sell him Dr. Bonaventura's practice assets because of the plaintiff's race. Dr. Sanghvi can proceed under either the conventional method of proof or under the burden-shifting method, *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 (7th Cir. 1993), and he has elected to use both. Our review of the district court's grant of summary judgment is *de novo. Id.* at 1471.

A. Conventional Method

Dr. Sanghvi argues that Triana's question during their June 19 conversation — "Being an older, foreign-born

physician, how comfortable do you fell dealing with young, white American women?" — constitutes direct evidence of discriminatory intent. Dr. Sanghvi contends that when this interrogatory is combined with circumstantial evidence, such as that the defendant rejected his November 6 offer to pay more money than WWC and that WWC was allowed to take over the practice without paying the full purchase price, he has made a sufficient case to reach a jury. St. Catherine's disputes the characterization of Triana's query as direct evidence, since the words themselves do not show a discriminatory animus and thus the jury would have to draw an inference from the statement to find that the defendant violated § 1981. It also argues more generally that summary judgment was properly granted because no reasonable jury could return a verdict for Dr. Sanghvi.

Courts have noted the difficulty of defining direct evidence for discrimination claims. *See, e.g.*, *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 581-84 (1st Cir. 1999); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992). Our own statements on what constitutes direct evidence are not in complete harmony. One line of cases holds that "[d]irect evidence essentially requires an admission by the decision-maker that his actions were based on the prohibited animus." *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000); *see also Hemisphere Bldg. Co., Inc. v. Village of Richton Park*, 171 F.3d 437, 439 (7th Cir. 1999); *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 722 (7th Cir. 1998). Under this definition, Dr. Sanghvi has not produced any direct evidence of discrimination since Triana's query clearly is not an admission. However, other cases hold that "[r]emarks and

other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality." *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001) (quoting *Miller v. Borden, Inc.*, 168 F.3d 308, 312 (7th Cir. 1999)); *see also Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999); *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997). Triana's question might be direct evidence under this broader understanding, since the question can be read as indicating Triana's concern over whether Dr. Sanghvi, as a non-white physician, will be able to form doctor-patient relationships with white women. *Cf. Sheehan*, 173 F.3d at 1044-45 (holding that statement that woman was fired so she could "spend more time at home with her children" was direct evidence of discrimination on the basis of pregnancy).

While we acknowledge the tensions in our case law on this issue, we will assume without deciding that the broader definition of direct evidence applies and that Triana's question falls within this definition. Besides having a certain degree of content that reflects discriminatory animus, we have held that to qualify as direct evidence a statement must also be made by a decisionmaker, as well as relate to the action at issue. *See Fyfe v. City of Fort Wayne*, 241 F.3d 597, 602 (7th Cir. 2001); *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 652 (7th Cir. 2000). While the parties do not discuss the two conditions, these appear to be satisfied as well, since Dr. Sanghvi alleges that Triana as CEO of St. Mary controlled whom the practice would be sold to, and the query at issue was asked in the course of a discussion on the sale of the practice. Thus, for purposes of this case, we accept that Dr. Sanghvi has produced what may be labeled direct evidence.

However, the plaintiff is not out of the woods yet. Even in discrimination cases where the plaintiff has direct evidence, an adverse grant of summary judgment may be proper. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086-87 (5th Cir. 1994) (per curiam); *FDIC v. Henderson*, 940 F.2d 465, 473-74 (9th Cir. 1991).[3] This follows from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986), which held that a grant of summary judgment against the non-moving party is appropriate, even where that party has produced some evidence, if no reasonable jury could return a verdict in his or her favor. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[4] While

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3. Contrary statements appear in some cases. For example, *Cardona Jimenez v. Bancomerico de P.R.*, 174 F.3d 36, 40 (1st Cir. 1999) and *Alvarez-Fonseca v. Pepsi Cola of P.R. Bottling Co.*, 152 F.3d 17, 24 (1st Cir. 1998), both Age Discrimination in Employment Act cases, opine that where a discrimination plaintiff has direct evidence, the case may be put to the fact finder "without further ado." However, these single, isolated statements are both clearly dicta, since direct evidence was not present in either case. *Eisenberg v. Insurance Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987), a diversity contract case, states that "if the non-moving party adduces direct evidence of a genuine issue of fact . . . [the case] is to be submitted to the trier of fact for resolution." However, this statement conflicts with the Ninth Circuit's later decision in *Henderson*, which provides the most thorough discussion of the issue which we have found. To the extent that other decisions conflict with our holding, we decline to follow them, largely for the reasons explained in *Henderson*, 940 F.2d at 474.

4. Of course, if the non-moving party has presented sufficient evidence to permit a reasonable jury to find for him or her, then a court cannot weigh the evidence on summary judgment and the motion must be denied. *See Anderson*, 477 U.S. at 255.

a grant of summary judgment against the plaintiff should be rare when he or she has evidence that could be characterized as direct, *cf. Venters*, 123 F.3d at 973 n.7, in a few select cases a review of the record as a whole may reveal that the evidence is "so one-sided that [the defendant] must prevail as a matter of law," *Anderson*, 477 U.S. at 252, at least where the purportedly direct evidence is not an actual admission. We conclude that this is such a case. Once the mass of uncontradicted evidence described below is taken into account, Triana's query is no more than a scintilla of evidence of racial discrimination and insufficient to permit a reasonable jury to return a verdict for Dr. Sanghvi.[5]

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5. We hold that no reasonable jury could find that racial animus was a motivating factor of the defendant's decision. However, even if this were not so, another barrier possibly exists to Dr. Sanghvi's recovery. Before the Civil Rights Act of 1991 ("CRA") was passed, an employer could escape all liability under Title VII or other federal anti-discrimination laws where the plaintiff presented sufficient evidence for a jury to conclude that impermissible animus was a motivating factor in the decision if the employer could demonstrate that it would have taken the same action for legitimate reasons alone. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The CRA amended Title VII so that in such cases a plaintiff need only show that an illegal criterion was a "motivating factor" of the defendant's decision in order to obtain relief, 42 U.S.C. § 2000e2(m), though his or her recovery will be limited if the defendant can show that legitimate reasons alone would have led to the same action, 42 U.S.C. § 2000e-5(g)(2)(B). However, Dr. Sanghvi's claim is under § 1981 rather than Title VII. At least one circuit court has held that the framework of *Price Waterhouse*, rather than 42 U.S.C. § 2000e-2(m), continues to apply to § 1981 claims. *Mabra v. United Food & Commercial Workers Local Union No. 1996*, 176 F.3d 1357 (11th Cir. 1999). If this is correct, then even if Dr. Sanghvi could raise

(Cont'd)

Appendix A

As briefly explained above, Triana's interrogatory is evidence of racial discrimination, since it suggests that Triana believed that Dr. Sanghvi could have difficulty forming patient relationships with white women because of his race. However, all of the other facts, which are basically undisputed, point to the conclusion that Dr. Sanghvi's ethnicity played no role in the defendant's decision to sell the practice assets to WWC. Triana made the initial offer to sell to Dr. Sanghvi in the days following June 11, prior to asking the potentially discriminatory query. After asking the question, Triana made a formal offer to Dr. Sanghvi on June 20. The terms of this initial offer were exactly the same as the defendant's opening position with WWC: $360,000, with no financing by the hospital. Triana then began negotiating in apparent good faith with the plaintiff. However, Dr. Sanghvi was unwilling or unable during June or early July to meet St. Catherine's requirement that the purchase price be paid in full. Even despite this fact, on the evening of June 24, Triana seemed favorably inclined to accepting an offer by the plaintiff which called for financing. Furthermore, Dr. Sanghvi was informed on July 1 that if a deal with WWC could not be worked out, the defendant would sell the assets to him on the terms laid out in his June 25 letter. All of this

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(Cont'd)
a genuine issue of fact as to whether the refusal to sell the practice to him was racially motivated, St. Catherine's would be relieved of all liability if it could show that it would have taken the same action because of WWC's offer even in the absence of any discriminatory animus. However, since we conclude that Dr. Sanghvi does not raise a genuine issue as to whether the defendant's refusal to sell the practice to him was motivated in part by racial bias, we need not reach this issue.

evidence shows that the defendant was perfectly willing to sell Dr. Sanghvi Dr. Bonaventura's practice on the same terms as it would to any other buyer.

Indeed, given the July 1 conversation, the only reason that the sale was not made to Dr. Sanghvi was because of the appearance of a purchaser with a better offer, WWC. In July, WWC was willing to meet the no-financing condition of the hospital, unlike Dr. Sanghvi. The plaintiff complains that in the end WWC did not actually satisfy this condition, since it took over the practice on November 1, 1997 and did not pay in full until January 5, 1998. However, the record provides no indication that the defendant would have refused to let Dr. Sanghvi assume running the practice before his potential deal with the defendant was final, so long as the full payment price was tendered at the closing. Also, while both WWC and Dr. Sanghvi were offering the same price, $250,000, WWC's offer was clearly preferable from the defendant's perspective. Dr. Sanghvi's June 25, 1997 offer provided that all of the payments toward the $250,000 price would be refunded if he did not complete the twelve monthly installments. Thus, Dr. Sanghvi potentially could form valuable relationships with Dr. Bonaventura's former patients over an eleven month period, then claim he was unable to make the last payment, have all of his money returned, and be able to lure away a significant number of the patients to his own practice. This could have left the hospital with a greatly devalued asset, since other potential buyers would be unlikely to pay much for a practice with few regular patients, and no money to show for this depreciation. By contrast, WWC's offer did not impose this risk on the defendant since it would be paying all of the money at once

and the payments could not be refunded. Finally, the defendant's June 20 letter demonstrated its concern about the limited resources Dr. Sanghvi could provide as a sole practitioner. By contrast, WWC, as a group of obstetrician/gynecologists, could provide much broader coverage and thus increase the revenues of the hospital through referrals.

In short, even if Triana's question might possibly be understood as suggesting some concern over the plaintiff's race, the surrounding facts demonstrate that St. Catherine's refusal to sell to Dr. Sanghvi was not motivated by racial or ethnic considerations, and no reasonable jury could find otherwise. We note that our decision is consistent with *Davis*, which affirmed a grant of summary judgment where an interviewer asked a female job applicant a "question concerning [her] ability to supervise and handle disputes with and among men," 14 F.3d at 1086, an interrogatory obviously quite similar to Triana's.

Dr. Sanghvi also contends that the rejection of his November 6 offer, which he claims was more favorable than WWC's because he was willing to pay a higher price, sufficiently supports his claim of discrimination to send the case to a jury. However, we have determined that Triana's negotiations with Dr. Sanghvi in June allay any supposition that Triana's actions were motivated by an impermissible animus, and that conclusion carries over to the rejection of the November 6 offer. Furthermore, by November the defendant had additional reasons not related to race or ethnicity for rejecting Dr. Sanghvi's offer. First, the defendant feared litigation with WWC for breach of contract if it suddenly ejected WWC from Dr. Bonaventura's practice after

agreeing to an outline of the terms on which the practice would be sold in July. Second, Dr. Sanghvi's August 2 letter showed antagonism toward the defendant, creating questions as to whether he would be as willing to refer patients to the defendant as WWC. Third, Dr. Sanghvi's allegedly impermissible direct billing when he filled in for Dr. Bonaventura had been discovered. Since St. Catherine's was later to file a counterclaim against Dr. Sanghvi for the amount of this direct billing, the defendant understandably did not want to depend for referrals on a doctor with whom it would soon be in litigation. Given all of these additional reasons for rejecting the November offer, we conclude that no reasonable jury could find that the defendant acted with discriminatory intent at that time.

B. Burden-Shifting Method

Under the frequently applied burden-shifting method established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the plaintiff must establish his or her *prima facie* case, then the defendant must articulate one or more legitimate, nondiscriminatory reasons for its action, and finally the plaintiff has an opportunity to show that the defendant's reasons are pretextual. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). While we do not underestimate the importance of requiring a plaintiff to satisfy the first step, *see Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1178 (7th Cir. 1997) ("emphasiz[ing] that the prima facie case under *McDonnell Douglas* must be established and not merely incanted"), we will skip to the question of pretext, in part because of the lack of a well-developed list of elements for a *prima facie* § 1981 case outside of the employment context.

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The defendant argues that it did not sell to Dr. Sanghvi because a better deal was presented by WWC. This is a legitimate reason for refusing to sell the practice assets to the plaintiff and Dr. Sanghvi cannot show that this reason is pretextual. The explanation for this conclusion tracks part of our discussion of why Dr. Sanghvi's direct evidence does not present a genuine issue of material fact, and so we will only briefly list the reasons supporting the defendant's sale to WWC rather than the plaintiff. In July, WWC offered to pay the defendant in a lump sum, something that the hospital had insisted upon and that Dr. Sanghvi could not do. Selling to WWC also increased the number of referrals that the hospital was likely to receive, since WWC was a group of physicians rather than a sole practitioner like Dr. Sanghvi. WWC's deal also did not have the refund provision contained in the plaintiff's June 25 offer.

Nor can Dr. Sanghvi show that the defendant's reasons for refusing to accept his offer on November 6 are pretextual. The defendant legitimately was concerned about being sued for breach of contract if it reclaimed the assets from WWC. The hospital could have still preferred WWC, even though it was offering less money, because its greater number of doctors would lead to more referrals and thus greater revenue for the hospital in the long run. Also, the discovery of Dr. Sanghvi's billing practices when he was filling in for Dr. Bonaventura and his August 2 letter, which was hostile to the defendant and seemingly an attempt to lure away Dr. Bonaventura's former patients to his practice, indicated that the defendant was unlikely to receive many referrals from the plaintiff if it sold him the practice.

Appendix A

III. Conclusion

We assume for purposes of this case that Triana's question falls within the outer ambit of direct evidence of racial discrimination. However, the other undisputed evidence prevents any reasonable jury from concluding that the defendant's decision to sell Dr. Bonaventura's practice to WWC rather than Dr. Sanghvi was motivated by racial or ethnic discrimination. Likewise, under the burden-shifting method Dr. Sanghvi cannot cast sufficient doubt on the reasons for the defendant's refusal to sell the practice to him to raise a triable issue as to pretext. Therefore, the district court's decision is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 3, 2001

BEFORE:

Honorable JOEL M. FLAUM, Chief Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 00-3613

PRAVIN SANGHVI, M.D.,

Plaintiff – Appellant

v.

LAKESHORE HEALTH SYSTEMS, INCORPORATED and ST. MARY MEDICAL CENTER, INCORPORATED,

Defendants – Appellees

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. 98 C 202, Theresa L. Springmann, Magistrate Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION DATED SEPTEMBER 8, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CAUSE NO.: 2:98-CV-202-TS

PRAVIN SANGHVI, M.D.

Plaintiff,

v.

LAKESHORE HEALTH SYSTEM, INC.,
ST. MARY MEDICAL CENTER, INC.,

Defendants.

ORDER

This matter is before the Court on a Motion for Partial Summary Judgment filed on July 2, 1999, by the Defendants, Lakeshore Health System, Inc., ("Lakeshore") and St. Mary Medical Center, Inc. ("St. Mary"). The Plaintiff, Pravin Sanghvi, M.D., filed a Response to the Motion on July 19, 1999, and the Defendants filed a Reply on August 4, 1999. For the following reasons, the Motion for Partial Summary Judgment is GRANTED.

Appendix B

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[S]ummary judgment is appropriate — in fact, is mandated — where there are no disputed issues of material fact and the movant must prevail as a matter of law. In other words, the record must reveal that no reasonable jury could find for the non-moving party." *Dempsey v. Atchison, Topeka, & Santa Fe Ry. Co.*, 16 F.3d 832, 836 (7th Cir. 1994) (citations and quotation marks omitted). Thus, a summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

No genuine issue of material fact exists for trial where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 322 (7th Cir. 1992). Stated positively, a genuine issue

for trial only exists where there is sufficient evidence favoring the non-movant for a jury to return a verdict for that party. *Anderson*, 477 U.S. at 249; *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1210 (7th Cir. 1993). Furthermore, not every factual dispute creates a barrier to summary judgment; instead, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. The inquiry involved in ruling on the motion for summary judgment implicates the substantive evidentiary standard of proof, for example, preponderance of the evidence, that would apply at trial. *Id.* at 252, 254; *Jean v. Dugan*, 20 F.3d 255, 263 (7th Cir. 1994).

A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party may discharge its "initial responsibility" by simply " 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. When the non-moving party would have the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* at 323, 325; *Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 n.3 (7th Cir. 1994); *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990). However, the moving party may, if it chooses, support

its motion for summary judgment with affidavits or other materials and thereby shift to the non-moving party the burden of showing that an issue of material fact exists. *Kaszuk v. Bakery & Confectionery Union & Indus. Intern. Pension Fund*, 791 F.2d 548, 558 (7th Cir. 1986); *Bowers v. DeVito*, 686 F.2d 616, 617 (7th Cir. 1982); *Faulkner v. Baldwin Piano & Organ Co.*, 561 F.2d 677, 683 (7th Cir. 1977). Under Local Rule 56.1, the moving part must file with the court a "Statement of Material Facts," supported by appropriate citation to the record, as to which the moving party contends there is no genuine issue.

Once a properly supported motion for summary judgment is made, the non-moving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings. F.R.C.P. 56(e); *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7th Cir. 1994). Federal Rule of Civil Procedure 56(e) establishes: "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *See also Anderson*, 477 U.S. at 248-50. Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts; the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 586; *Juarez*, 957 F.2d at 322. Under Local Rule 56.1, the party opposing the motion shall file any affidavits or other documentary material controverting the movant's position, including a "Statement of Genuine Issues," supported by appropriate citation to the record, that outlines the material facts that the non-movant contends present genuine issues of fact that must be litigated. *See also*

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Waldridge v. American Hoechst Corp., 24 F.3d 918, 922 (7th Cir. 1994).

In viewing the facts presented on a motion for summary judgment, the court must construe all facts in the light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in favor of that party. *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 234 (7th Cir. 1995); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994); *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1440 (7th Cir. 1992). The court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 249-50; *Doe*, 42 F.3d at 443. Furthermore, in determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion. L.R. 56.1

PROCEDURAL BACKGROUND

On June 18, 1998, Dr. Sanghvi filed suit in Lake Superior Court against Lakeshore, St. Mary, and other Defendants. On July 13, 1998, the Defendants removed the case to this Court. On July 2, 1999, Lakeshore and St. Mary filed a Motion for Partial Summary Judgment as to Sanghvi's § 1981 claims and his breach of contract claim.

Appendix B

MATERIAL FACTS

Pravin Sanghvi, M.D., who describes his racial and ethnic background as "Asian Indian," is an obstetrician/gynecologist (OB/GYN) physician licensed to practice in the State of Indiana. Since 1994, Dr. Sanghvi has maintained a private practice in Hobart, Indiana, and full staff privileges at St. Mary Medical Center, an acute care/hospital facility. In 1994, Dr. Sanghvi met A. P. Bonaventura, M.D., a physician who had a private OB/GYN practice and offices in St. Mary Medical Center. Beginning in 1994, when Dr. Bonaventura was unavailable, Dr. Sanghvi would treat Dr. Bonaventura's patients in Dr. Sanghvi's office and Dr. Bonaventura's hospitalized patients in St. Mary Medical Center. When Dr. Sanghvi would treat one of Dr. Bonaventura's patients, Dr. Sanghvi, pursuant to an agreement with Dr. Bonaventura, would bill the patient or his insurer under Dr. Sanghvi's name, with his own provider and tax identification numbers.

In October of 1996, Dr. Bonaventura sold his practice to Lakeshore, which owned and operated St. Mary. In purchasing Dr. Bonaventura's practice, the Defendants' chief consideration was to bolster the use of hospital OB/GYN services and its revenues. Medicaid reimbursement represented a significant portion of OB/GYN revenues. Although Dr. Bonaventura sold his practice, he remained an employee of Lakeshore and continued to see patients of the practice until May of 1997. During this time and at Dr. Bonaventura's request, Dr. Sanghvi continued to cover Dr. Bonaventura's practice. Between October of 1996 and June of 1997, when Dr. Sanghvi treated one of Dr. Bonaventura's patients,

Dr. Sanghvi would bill the patient or the insurer under Dr. Sanghvi's own name, with his own provider and tax identification numbers.

In late May of 1997, Dr. Bonaventura, because of his declining health, was no longer able to maintain his practice. In early June of 1997, Milton Triana, the Chief Executive Officer of the St. Mary, Patrick Midkiff, the Regional Administrative Director of Lakeshore, and Louis Molina, the Chief Financial Officer of St. Mary, met with Dr. Sanghvi and Dr. Joseph Gasparovic to discuss the care and treatment of Dr. Bonaventura's patients during his illness. During this meeting, the parties discussed the treatment of Dr. Bonaventura's patients at the hospital, but not at the office. The parties reached an agreement as to the days that Dr. Sanghvi and Dr. Gasparovic would cover the practice, but the parties reached no agreement regarding Dr. Sanghvi's compensation. During this meeting, the parties had no discussion regarding Dr. Sanghvi's billing of the patients or insurers for his services, and no agreement was ever reached between Lakeshore and Dr. Sanghvi regarding Dr. Sanghvi's billing under his own name, with his own provider and tax identification numbers. From this early June meeting to July 3, 1997, only Dr. Sanghvi and Dr. Gasparovic treated Dr. Bonaventura's patients in Dr. Bonaventura's office.

On or about June 11, 1997, Lakeshore informed Dr. Sanghvi and Dr. Gasparovic that Dr. Bonaventura might not return to the practice and that, if he were unable to return, the hospital would either employ a replacement physician or sell the practice. Triana told Dr. Sanghvi and Dr. Gasparovic that Lakeshore would be interested in discussing a sale of

the practice to them, if Lakeshore ultimately decided to sell it. Dr. Sanghvi, but not Dr. Gasparovic, immediately expressed an interest in purchasing the practice assets. When it was determined that Dr. Bonaventura would not return to the practice, Triana offered the practice to Dr. Gasparovic and Dr. Sanghvi. In a letter dated June 17, 1997, Dr. Sanghvi wrote to Triana expressing his interest in being employed as Dr. Bonaventura's replacement or in purchasing the practice.

On the evening of June 19, 1997, a discussion occurred in Triana's office during which Triana asked Dr. Sanghvi the following question: "Being an older, foreign-born physician, how comfortable do you feel dealing with young, white, American pregnant women?" Sanghvi Dep. at 35. Triana told Dr. Sanghvi that Lakeshore was looking for someone who could make a cash purchase. On June 20, 1997, Triana wrote a letter to Dr. Sanghvi expressing his satisfaction at Dr. Sanghvi's interest in buying the practice assets. Triana's letter noted the requirement that the purchase price be paid in full at the closing and not be financed[1] by Lakeshore:

> The Purchase Price would be Three Hundred Sixty Thousand and 00/100 Dollars ($360,000.00) payable in full at Closing. The Purchase Price may not be financed by the hospital, health care facility,

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1. Triana understood the requirement of payment in full at closing to be a non-negotiable condition of the sale because of federal law governing Medicaid reimbursements when certain "financial relationships" exist between referring physicians and health care provider entities, such as hospitals. Furthermore, the Defendants desired to sell the medical practice on a cash basis to be free of continuing obligations for payment and additional entanglements.

> health care system, medical practice, or any other individual or entity in competition with the services provided by the Hospital. . . .

Triana Aff. at ¶ 6 & Triana Ex. 3; Sanghvi Dep. Ex. 20. On June 24, 1997, Dr. Sanghvi wrote to Triana, indicating that Lakeshore's price was beyond his means, and submitted the following counter-offer:

> I [Dr. Sanghvi] will pay 20% of the gross collection for the first year from Dr. Bonaventura's practice. The payments will be made monthly. This will be the total payment for everything you have mentioned in Clause 2 of your letter. . . .

Triana Aff. at ¶ 8 & Ex. 4; Sanghvi Dep. Ex. 8. Lakeshore did not accept this counter-offer.

That evening, June 24, 1997, Dr. Sanghvi and Triana had a conversation in the parking lot at St. Mary regarding the sale of the practice. Dr. Sanghvi offered to purchase the practice for $250,000. According to Dr. Sanghvi, Triana accepted the offer during this parking lot conversation, stated that he was the CEO, and indicated that "you [Dr. Sanghvi] can give such an offer, which will be acceptable to [me], however, [I] do not make the final decision. It will have to be taken to a committee, and I will have a response." Sanghvi Dep. at 21. *See also* Sanghvi Dep. at 84, 201. In this conversation, Triana reiterated that the purchase needed to be in cash and that the hospital would not finance the purchase. Dr. Sanghvi told Triana that he would need some time to make arrangements for the cash, and Triana responded that "we'll give you some time." Sanghvi Dep. at 83.

On the next day, Dr. Sanghvi repeated his June 24 oral offer in a letter to Triana. In the letter dated June 25, 1997, Dr. Sanghvi offered to purchase the practice assets for $250,000, a sum which would be paid over a one-year period in the following manner: a check for $5000 as earnest money "enclosed with this offer";[2] $20,000 paid as soon as an agreement is signed; and the remainder in monthly payments within one year or less. Sanghvi Dep. Ex. 9. The terms of Dr. Sanghvi's counter-offer also provided: the hospital would continue to own the practice until the entire purchase price was paid; and if he failed to pay the entire purchase price within one year, Lakeshore would have the right to sell the practice to any willing buyer, but all of his payments would be refunded upon the sale of the practice.

Meanwhile, in the latter part of June of 1997, Lakeshore received an unsolicited offer to purchase the practice. This offer was made by a representative of the Women's Wellness Center, P.C., ("WWC"), an entity that employed three physicians, all of which were white, American-born males, but none of which had privileges at St. Mary. Over a period of several days, negotiations continued between the representatives of Lakeshore and WWC regarding the possible sale. On July 1, 1997, Triana, Midkiff, and Molina met with Dr. Sanghvi and told him that WWC would pay cash for the practice, but that if the WWC deal were to fall through, Lakeshore would accept Dr. Sanghvi's offer as reflected in his letter of June 25, 1997. On July 3, 1997, Lakeshore and WWC signed a Letter of Intent, which expressed the broad terms of the agreement between

2. Dr. Sanghvi's "earnest money" check, which accompanied his June 25 offer, was never negotiated and was returned to him.

Lakeshore and WWC. On that same day, Midkiff went to Dr. Bonaventura's office and told the staff to start scheduling patients at the clinic for one of the WWC doctors. Thus, once the Letter of Intent was signed, Lakeshore and WWC began the process of transitioning the doctors of WWC into a relationship with the patients of the practice.

On or about July 7, 1997, Midkiff told Dr. Sanghvi that the practice was sold to WWC. However, no money to this point had been paid by WWC or any of its doctors. As WWC's integration of the practice progressed through the summer of 1997, Dr. Sanghvi sent a letter, dated August 2, 1997, to the former patients of Dr. Bonaventura who had also been Dr. Sanghvi's patients. This letter stated in part:

> Some of you have directly asked me a question "why I did not take over Dr. Bonaventura's practice?" Some of you might be hesitant to ask. So I decided to answer it.
>
> I worked with Dr. Bonaventura often and on for about two years, whenever he needed to take some time off, more so during last one year when his health was failing. When he finally decided to quit, I was seeing his patients in his office for more than a month. During this period, I had an opportunity to meet with most of you and you had an opportunity to meet with me. So this is a very legitimate question for you to ask.
>
> When Dr. Bonaventura finally decided that he can no longer work, his practice was "for sale"

Appendix B

[Sale of practice means selling all the office furniture, equipment and most importantly all the patient records.]

The practice was for sale to the one who paid the most money for it. There were no other deciding factors. I know it since I had made an offer to purchase it. Dr. Bonaventura did not own the practice and he did not make any decision. Any "John Doe", willing to pay the most money, could have bought the practice, whether he was a friend and/or colleague of Dr. Bonaventura or not.

About a year or so ago Dr. Bonaventura had decided to sale [sic] his practice because of stresses and strains of managing the practice. Some of his "friends and colleagues" were interested in buying his practice even at that time. But Dr. Bonaventura decided to sell it to the hospital and not to any of his friend or colleague.

I am very very sure that Dr. Bonaventura will be happy for all of his patients as long as they are receiving good care. It does not matter who the physician is. This should strictly be your decision.

I would like to send this letter to all of Dr. Bonaventura's patients. Quite a few of Dr. Bonaventura's patients are now coming to my office and more are on their way. But I do not have addresses of all the patients. If you know any of his patients, please share this letter with her.

> I hope I have clarified by this letter why I did not take over Dr. Bonaventura's practice. If you have any questions or concerns, please feel free to call, whether you are my patient or not.

Sanghvi Dep. Ex. 6.

During the summer and into the fall of 1997, the negotiations regarding the purchase continued between the representatives of WWC and Lakeshore. Toward the end of October of 1997, the parties agreed on a purchase price of $125,000, and Lakeshore received a check for $50,000.[3] On or about November 1, 1997, Lakeshore ceased billing operations for the practice, and all medical records for patients of the practice were transferred to WWC. Thus, on November 1, 1997, WWC took over the practice, and only the legal formalities remained to be completed. On or about November 6, 1997, Dr. Sanghvi and Triana spoke by telephone. Triana indicated that the sale price was between $65,000 and $200,000 and that the final agreement was not yet signed. Dr. Sanghvi immediately offered to purchase the practice for $200,000 cash, but Triana did not respond. Lakeshore received a check for $75,000 from WWC in December of 1997. On December 22, 1997, Dr. Sanghvi was again told that the practice had already been sold, and Triana explained that Lakeshore sold the practice to WWC because WWC had a larger group of physicians and could provide the better coverage. On January 5, 1998, representatives of Lakeshore and WWC signed an Asset Transfer Agreement that identified the purchase price as $125,000.

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3. Although this check was accidentally destroyed, a replacement check of $50,000 was received in late December of 1997 or in early January of 1998.

Appendix B

DISCUSSION

Dr. Sanghvi has alleged that the Defendants discriminated against him in the making, performance, modification, and termination of contracts by rejecting his offer to purchase a medical practice. Although the Complaint does not identify the federal statute that Dr. Sanghvi urges as the basis for jurisdiction, it has been determined that he is proceeding pursuant to 42 U.S.C. § 1981. Dr. Sanghvi claims that the Defendants' failure to sell him the practice assets was because of his race. Dr. Sanghvi contends that his parking lot discussion with Triana constituted an oral agreement requiring Lakeshore to sell the practice to him. Dr. Sanghvi also contends that his June 23 letter to Triana constituted a written agreement for the sale of the practice assets.

The Defendants have taken the position that the decision to sell the practice to WWC was based upon legitimate business considerations and was not based upon any factor relating to Dr. Sanghvi's race or ethnicity. The Defendants contend that Dr. Sanghvi's June offers did not meet their requirements because they were not willing to finance Dr. Sanghvi's purchase of the practice. The Defendants urge that, under Dr. Sanghvi's proposal, Dr. Sanghvi's failure to purchase the practice assets would ultimately cost him nothing, as all of his payments would have been reimbursed and that he would have benefitted through extended contact with, and likely acquisition of, the Defendants' patients. The Defendants also contend that, under Dr. Sanghvi's proposal, at the end of the one-year purchase period, the Defendants would run the risk of trying to find a new buyer for a medical practice that had fewer patients.

Appendix B

A. Post-Formation § 1981 Claim

Dr. Sanghvi alleged in his Complaint that the Defendants discriminated against him in the performance, modification, and termination of the purchase contract and in the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. The Defendants filed a Motion for Partial Summary Judgment and supporting Memorandum, arguing that the absence of a purchase contract bars Dr. Sanghvi's post-formation § 1981 claims and further bars his state cause of action for breach of the purchase contract. The Defendants argue that before it is possible for a person or entity to take any action with respect to the "performance, modification, or termination" of a contract, the underlying contract must first be demonstrated to exist. In other words, they argue that, with no contract, there can be no contractual relationship, and that with no contractual relationship, there can be no act of discrimination with respect to the benefits, privileges, terms, and conditions of that contractual relationship.

The formation of a contract requires an offer, an acceptance of the offer, and consideration. *Straub v. B.M.T. by Todd*, 645 N.E.2d 597 (Ind. 1994). Acceptance that is conditioned upon the occurrence of some other event, or that is otherwise equivocal, is not sufficient to form a contract. *Kritz v. Moon*, 88 Ind. App. 5, 163 N.E. 112 (1928).

The Defendants argue that even if Dr. Sanghvi made a verbal offer to purchase the practice assets on June 24, 1997, there is no evidence that the offer was supported by consideration and, more importantly, there is no evidence

that Triana clearly, unequivocally, and unconditionally accepted Dr. Sanghvi's offer. The Defendants point out that Dr. Sanghvi testified in his deposition that Triana clearly told him to expect a response later.[4] The Defendants argue that Dr. Sanghvi's testimony as to Triana's response to his offer is fatal to his claim because it clearly establishes that Dr. Sanghvi was specifically told in the parking lot that no response to his offer was being made and that any acceptance or rejection would be issued in the future. The Defendants contend that because Dr. Sanghvi's "parking lot offer" was neither accepted nor rejected at the time of its tender, no contract was formed in St. Mary's parking lot on June 24, 1997. In further support of its contention, the Defendants note that in the days that followed the June 24 offer, Sanghvi did not act as though he believed a contract had been formed. In his June 25 letter to Triana, which Sanghvi termed "Offer to purchase Dr. Bonaventura's Practice," Dr. Sanghvi referred to earnest money being enclosed "with this offer." Further, in his June 30, 1999, Answers to Triana's Interrogatories, Sanghvi referred to the June 25 letter as a "written offer." The Defendants argue that if an agreement between Dr. Sanghvi and Triana had been in place on June 24, then a further offer on June 25 would be nonsensical.

In response, Dr. Sanghvi argues that Triana had authority to bind the hospital in accordance with the parking lot discussions on June 24, 1997. According to Dr. Sanghvi, Triana indicated that all of the proposals on the evening of June 24 were acceptable to him, and Dr. Sanghvi merely memorialized the details of the conversation in his June 25,

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4. Sanghvi Dep. at 21.

1997, letter. Dr. Sanghvi concludes that, because Triana was the CEO of St. Mary and because he indicated that Dr. Sanghvi's proposals were acceptable to him, then a jury could reasonably conclude that he had authority to accept Dr. Sanghvi's offer and that when he found the offer acceptable he did so on the Defendants' behalf. Dr. Sanghvi further argues that even if Triana did not have actual authority to bind the Defendants, the Defendants may still be bound if it placed Triana in a position that made it reasonable for Dr. Sanghvi to believe he had authority. Dr. Sanghvi points out that it was Triana who met with Dr. Sanghvi and Dr. Gasparovic on June 11, 1997, negotiated with Dr. Sanghvi on June 19, 1997, and wrote the June 20, 1997, correspondence on corporate letterhead offering to sell the practice to Dr. Sanghvi. Dr. Sanghvi contends that a reasonable juror could conclude that Dr. Sanghvi reasonably believed that Triana had the ability to bind the hospital on June 24, 1997.

In reply, the Defendants contend that the plain meaning of the words Dr. Sanghvi attributes to Triana, considered in their entirety, do not manifest a clear, unequivocal acceptance of Dr. Sanghvi's proposal on behalf of the Defendants. The Defendants argue that Triana clearly avoided giving any "official" response to Dr. Sanghvi's proposal and plainly told Dr. Sanghvi that something else must occur before he would have a response for Dr. Sanghvi. The Defendants urge that the only conclusion that can reasonably be drawn from Dr. Sanghvi's deposition testimony is that Triana was "putting him off" and refusing to be pressured into making a quick decision in the hospital parking lot. The Defendants further argue that, even if Triana had the authority to accept Dr. Sanghvi's offer "on the spot," Triana's insistence that the

matter had to be reviewed by a committee, even if false, manifested a clear intent that Triana was not forming a contract at that time. The Defendants note that, in determining whether a contract has been formed, what ultimately controls is the parties' outward manifestation of intent. *Holloway v. Giganti, Inc.*, 540 N.E.2d 97 (Ind. Ct. App. 1989).

In the present case, Triana's words and actions demonstrate that he did not intend to make a binding contract on June 24, 1997. Thus, even if Dr. Sanghvi believed that Triana had the authority to accept his proposal on behalf of the Defendants, Triana clearly informed Dr. Sanghvi that he was not accepting the proposal at that time. Furthermore, Dr. Sanghvi's June 25, 1997, correspondence indicates that Dr. Sanghvi understood that a contract had not been formed in the parking lot on June 24, 1997. In this letter, Dr. Sanghvi stated that he was making an offer and enclosing earnest money in support of that offer. If Dr. Sanghvi had believed that a contract had been formed on June 24, 1997, he would have referred to the "contract" and not his "offer" in his June 25, 1997, letter. This Court finds, as a matter of law, that the parties did not enter into a purchase contract on June 24, 1997. In the absence of a contract, Dr. Sanghvi's § 1981 post-formation claim fails.

B. Breach of Purchase Contract Claim

The Defendants argue that the absence of an underlying contract is also fatal to Dr. Sanghvi's breach of contract claim under Indiana law. One of the essential elements of a breach of contract action is the existence of a contract. *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993);

Peterson v. Culver Educational Foundation, 402 N.E.2d 448, 461 (Ind. Ct. App. 1980). Thus, Dr. Sanghvi's breach of purchase contract claim also fails.[5]

C. Pre-Formation § 1981 Claim

Dr. Sanghvi also alleged in his Complaint that the Defendants discriminated against him in the making of a contract by rejecting his offer to purchase a medical practice. In its Motion for Partial Summary Judgment and supporting Memorandum, the Defendants contend that Dr. Sanghvi has not provided any direct evidence that, because of his race, the practice assets were not sold to him. Dr. Sanghvi, however, claims that he has direct proof of discriminatory intent. According to Dr. Sanghvi, Triana uttered a direct, transaction-related racial remark to Dr. Sanghvi when Triana asked "being an older, foreign-born physician, how comfortable do you feel dealing with young, white, American women?"

To support a claim of pre-formation discrimination, or discrimination in the making of a contract, Dr. Sanghvi may

5. The Defendants also argue that, even if a contract existed and a breach of the contract were found, Dr. Sanghvi would still have to establish that the breach was due to intentional discrimination on the basis of his race/ethnicity in order to maintain a, cause of action under § 1981. *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 510-11 (7th Cir. 1986). The Defendants maintain that the undisputed facts clearly establish that they rejected Dr. Sanghvi's offer based upon legitimate, non-discriminatory business considerations, not Dr. Sanghvi's race or ethnicity. This issue is rendered mute by this Court's finding that the parties did not enter into a purchase contract.

meet his burden of proof by offering direct proof of discriminatory intent. *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 (7th Cir. 1993). Direct evidence is such that, if believed by the trier of fact, will prove the truth of the particular fact in question without reliance upon inference or presumption. *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989). Intent is generally subject to proof only through circumstantial evidence. *Friedel v. City of Madison*, 832 F.2d 965, 972 (7th Cir. 1987). Direct evidence of discriminatory intent must not only speak directly to the issue of discriminatory intent, it must also relate to the specific decision in question. *Randle*, 876 F.2d at 563. In the alternative, Dr. Sanghvi may rely upon the Title VII indirect, burden-shifting method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), that also applies to claims of racial discrimination under § 1981.

The Defendants argue that, even if the jury were to believe that Triana made the statement that is attributed to him, the words of that statement do not indicate racial animus and are in no way disparaging or stereotypical. The Defendants urge that while the wording of the alleged remark characterizes Dr. Sanghvi with respect to his age, to his national origin, and to his occupation, it does not refer to Dr. Sanghvi's race or ethnicity. The Defendants argue that the probative value of the alleged remark as evidence of racial animus depends upon inference, which removes the remark from the category of direct evidence. *See Randle*, 876 F.2d at 569.

The Court finds that the alleged statement is not direct evidence of discriminatory intent. Nothing in the statement

shows conclusively that Triana held racial animus against Dr. Sanghvi; rather, the statement is capable of being interpreted in many ways other than as evidence of discriminatory animus. In the statement, Dr. Sanghvi is asked how he feels about serving young white American women. This question could have been asked for a number of reasons depending on how familiar Triana was with Dr. Sanghvi and his Asian Indian culture. In any event, the very fact that the statement requires interpretation to discern its intent disqualifies it as direct evidence.

Because Triana's alleged remark does not constitute direct evidence, Dr. Sanghvi must prove his case pursuant to the *McDonnell Douglas* analytical framework. The parties agree on the elements of indirect proof that Dr. Sanghvi must demonstrate to establish a *prima facie* case under *McDonnell Douglas*.[6] The parties also agree that Dr. Sanghvi is a member of a protected racial class. The Defendants dispute, however, that Dr. Sanghvi was the best qualified bidder on the practice assets. The Defendants argue that at no time prior to November 6, 1997, did Dr. Sanghvi offer a cash transaction or make any offer that did not require the creation of a "financial relationship" that would have precluded referral of Medicare/Medicaid patients to St. Mary. The Defendants also argue that Dr. Sanghvi's conduct during the summer of

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6. The elements of Dr. Sanghvi's *prima facie* case are: (1) that Dr. Sanghvi is a member of a racially protected class; (2) that Dr. Sanghvi was the best qualified purchaser, or at least as qualified as the ultimate purchaser (WWC); (3) that the defendants refused to sell the practice to Dr. Sanghvi despite his qualifications as a purchaser; and (4) that the ultimate purchasers was of a race other than Dr. Sanghvi's.

1997, including his alleged abuse of his position of trust to divert patient billings from the practice and his letter to "Dr. Bonaventura's Patients," disqualified him as a "friendly" physician from whom St. Mary might expect referrals and admissions. Lastly, the Defendants contend that Dr. Sanghvi's practice compared unfavorably with the depth of coverage that the physician group at WWC could provide.

In response, Dr. Sanghvi argues that he was a qualified purchaser because the Defendants showed repeated interest in having him purchase the practice assets, anal Dr. Sanghvi was the first person offered the practice. With respect to the Defendants' argument that Dr. Sanghvi was not a qualified purchaser because he did not make a cash offer, Dr. Sanghvi responds that WWC did not pay for the practice in full until January of 1998, even though it signed a letter of intent to purchase on July 3, 1997, for $250,000.[7] Thus, Dr. Sanghvi argues that a jury must evaluate the credibility of the Defendants' claim that Dr. Sanghvi's need of a "financial relationship" disqualified him from the purchase.

The Defendants explain that the requirement that the purchaser of the practice pay a lump sum in cash was based

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7. Dr. Sanghvi makes much of the fact that WWC gave the Defendants a check for $50,000 in late October of 1997 that was not cashed until much later. Dr. Sanghvi seems to imply that the Defendants somehow financed WWC's purchase of the practice by virtue of the fact that WWC did not make full payment for the practice immediately after signing the Letter of Intent on July 3, 1997. However, Dr. Sanghvi has not produced evidence demonstrating a "financial relationship" existed between WWC and the Defendants that would necessitate submitting the question to a jury.

on legal and business considerations. First, federal law relating to prevention of fraud and abuse in Medicaid reimbursement prohibits certain "financial relationships" between referring physicians and health care provider entities, such as hospitals.[8] Thus, if a prohibited financial relationship[9] were found to exist between a physician referring Medicaid patients and St. Mary, federal law would bar the payment of Medicaid reimbursement to St. Mary for patients referred by that physician. Triana was advised and understood that the requirement of payment in full at closing was a non-negotiable condition of any sale. Second, the Defendants sought to sell the medical practice on a cash basis to free themselves from continuing obligations for payment and to conclude the sale without further entanglements. Third, the Defendants' chief consideration in original purchase of Dr. Bonaventura's practice in 1996 had been to bolster the use of hospital OB/GYN services and its revenues, and medicaid reimbursement represented a significant portion of OB/GYN revenues. Thus, if Lakeshore were to accept periodic payments of the purchase price, it might be deemed to be financing a physician's purchase of the practice assets under federal law, thereby excluding itself from Medicaid reimbursements for patients referred by that physician. The Defendants reiterate that, from the outset, they made clear to Dr. Sanghvi that purchase proposals involving installment payments or other hospital financing of the purchase would not be considered.

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8. *See* 42 U.S.C. § 1395nn *et seq.*

9. A "financial relationship" is defined in the federal statute as "an ownership or investment interest in the entity." *Id.*

Appendix B

Dr. Sanghvi did not offer to pay cash in full until November 6, 1997, after Lakeshore had already offered the practice to WWC. While it may be, as Dr. Sanghvi claims, that WWC did not pay for the practice in full until after it had begun billing operations at the practice, there is no evidence that WWC did not pay the full purchase price at the closing or that WWC entered into any prohibited financial relationship in order to purchase the practice. The Court finds, therefore, that Dr. Sanghvi did not make a timely offer that satisfied the Defendants' requirement of a cash purchase, that Dr. Sanghvi has failed to show that he was a "qualified purchaser," and thus that Dr. Sanghvi has failed to establish a *prima facie* case of discrimination.

The Defendants further argue that, even assuming Dr. Sanghvi has established a *prima facie* case of intentional discrimination, the Defendants have produced legitimate, non-discriminatory reasons for the decision not to sell the medical practice to Dr. Sanghvi. If the Defendants produce evidence that would permit the conclusion that there was a legitimate, non-discriminatory reason for the decision not to sell the practice to Dr. Sanghvi, the presumption of unlawful discrimination drops from the case and is no longer relevant. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981). Dr. Sanghvi must then prove, by a preponderance of the evidence, that the legitimate reasons offered by the Defendants were not their true reasons, but were merely a pretext for discrimination. *Burdine*, 450 U.S. at 253. To survive summary judgment, Dr. Sanghvi is required to produce evidence that creates an issue of fact as to whether the non-discriminatory reasons put forward by the defendants

are pretextual. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67 (7th Cir. 1995). In other words, Dr. Sanghvi must create a factual issue as to "whether the employer honestly believes in the reasons it offers," not whether the Defendants made a bad decision. *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1145 (7th Cir. 1994). Pretext may be established directly with evidence that the Defendants were more likely than not motivated by discriminatory reasons, or indirectly by evidence that the Defendants' explanation is not credible. *Sarsha v. Sears*, 3 F.3d 1035, 1039 (7th Cir. 1993).

As has already been noted, the Defendants have identified several legitimate, non-discriminatory reasons for selling the practice to WWC and not to Dr. Sanghvi: their receipt of Medicaid reimbursement for patients referred from the practice was an important source of revenue for St. Mary; the provisions of federal law preventing Medicaid/Medicare fraud and abuse prohibited the existence of any "financial relationship," such as installment payments, between a hospital and a practice referring patients to that hospital; on July 3, 1997, WWC agreed in writing to purchase the practice outright for cash; and WWC, which was comprised of three physicians; employed more physicians to cover the practice and provided the prospect of more referrals and more revenue to St. Mary Medical Center than would be expected from a sole practitioner.[10] Thus, in order not to jeopardize St. Mary's

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10. The Defendants also present as a legitimate, non-discriminatory basis Dr. Sanghvi's alleged diversion of revenues and antagonism. Because these issues relate to the Plaintiff's remaining state claim or the Defendants' counterclaim, because some of the alleged wrongdoing occurred after the alleged formation of the

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eligibility for Medicaid reimbursement for services to patients of the practice, the Defendants emphasized to Dr. Sanghvi that the practice would be sold outright for cash and that the Defendants would not finance the purchase. However, from June of 1997 until his proposed cash purchase on November 6, 1997, all of Dr. Sanghvi's purchase proposals were either conditional, revocable, or premised upon Lakeshore financing Dr. Sanghvi's purchase by acceptance of "installments" upon the purchase price.

Dr. Sanghvi, in response, asserts that he need not disprove each theory that Lakeshore has presented. However, this is incorrect. As explained in *Russell v. Acme-Evans Co.*:

> Now it might seem that as soon as one reason for an allegedly discriminatory action is found to be a pretext (or rather must be assumed for purposes of summary judgment to be a pretext, because the plaintiff has succeeded in putting the matter in doubt), the company's honesty is so far drawn in question, and the plausibility of supposing that the action was not based on an invidious motive is so weakened, that the defendant cannot possibly stave off a trial. But this is true only if the company has offered no other reason that, if that reason stood alone (more precisely if it did not have

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(Cont'd)
contract in June of 1997 and the signing of the Letter of Intent on July 3, 1997, and because other legitimate, non-discriminatory bases have been established by the Defendants, the Court finds it unnecessary to consider this alleged basis in order to rule on the Motion for Partial Summary Judgment.

support from the tainted reason), would have caused the company to take the action of which the plaintiff is complaining. *Kralman v. Illinois Dept. of Veterans' Affairs*, 23 F.3d 150, 157 (7th Cir. 1994). Suppose the company claims to have had two reasons either of which would have caused it to take the action. Concretely, suppose that in a case of alleged racial discrimination in which the plaintiff was fired, one reason given by the employer is that the plaintiff is a thief and the other is that he is a drug dealer. Suppose the plaintiff succeeds in showing that the company may not really have believed he is a thief, or that it would not have fired him even if it had believed this, but it is conceded both that the company believed that he is a drug dealer and that this belief would have caused the company to fire him even if the company did not actually believe that he was a thief as well but tossed this additional "reason" into the pot merely to make its case for firing him more impressive. It would be plain that the plaintiff would have been fired regardless of his race, and so he could not withstand summary judgment. *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1012 (7th Cir. 1994); *Pignato v. American Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994).

The defendant has offered several independent reasons, backed up by affidavits, for each of the challenged actions. The fact that some of these reasons were successfully called into

> question by Russell's deposition or affidavit does not defeat summary judgment if at least one reason for each of the actions stands unquestioned.

51 F.3d 64, 69 (7th Cir. 1995). Dr. Sanghvi is required to produce admissible evidence creating a genuine issue of fact as to whether each of the non-discriminatory reasons put forward by the Defendants is pretextual.

Dr. Sanghvi argues that a trier of fact must resolve the Defendants' assertion that it would receive more referrals if it sold the practice to WWC because it is disputed that the Defendants could expect more referrals from WWC than from Dr. Sanghvi. However, the issue is not properly whether the Defendants' expectations were reasonable or sound, but whether the Defendants honestly believed that WWC represented a potentially rich source of referrals to St. Mary's OB/GYN department, as compared to Dr. Sanghvi. All Dr. Sanghvi has done is question the reasonableness or soundness of the Defendants' expectation. Dr. Sanghvi has not, as he must, presented any evidence challenging the sincerity of the Defendants' belief. Thus, Dr. Sanghvi has failed to show that the Defendants' expectation of more referrals from WWC was not a legitimate, non-discriminatory reason for the Defendants' decision to sell the practice to WWC.

Dr. Sanghvi further argues that the Defendants' claim that they sold the practice to WWC to avoid a "financial relationship" must also go to the jury. Dr. Sanghvi states: "In reality [the Defendants'] dealings with [WWC] gave them at least two, and up to six, months to accumulate and tender the required cash payment. During that period, [WWC] was

either being paid by [the Defendants] for its services to patients, or was billing for those services in its own name. The sale to [WWC] was certainly not free of financial 'entanglement', and the jury must judge the credibility of this proffered 'reason' along with the others." Response Brief at 19. The Defendants answer that no evidence has been presented that the delay in concluding the sale with WWC violated federal law. Because the Defendants' goal was to avoid financial relationships that violated federal law (thereby preventing it from accepting Medicaid referrals from WWC), Dr. Sanghvi has not raised any factual issues concerning the credibility of the Defendants' desire to avoid the creation of a prohibited financial relationship.

Because Dr. Sanghvi has not met his burden of showing that Dr. Sanghvi was a qualified purchaser (or the best qualified purchaser) and that the Defendants' proffered legitimate, non-discriminatory reasons for not selling the practice to him were pretextual, summary judgment is properly granted in the Defendants' favor.

REMAND

Furthermore, because no federal claims remain that would provide a basis for federal jurisdiction and because this Court finds no countervailing circumstances warranting retention of this case, the parties' state claims are remanded to state court. *See Payrie for Hicks v. Churchich*, 161 F.3d 1030, 1043 (7th Cir. 1998); *Wright v. Associated Ins. Cos., Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994).

Appendix B

CONCLUSION

For all of the foregoing reasons, the Defendants' Motion for Partial Summary Judgment is hereby GRANTED. This case is REMANDED to the Lake Superior Court Room One in Hammond for ail further proceedings on the parties remaining state claims.

SO ORDERED this 8th day of September, 2000.

s/ Theresa L. Springmann
MAGISTRATE JUDGE
THERESA L. SPRINGMANN
UNITED STATES DISTRICT
COURT

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 6, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 6, 2001

Before:

Hon. Joel M. Flaum, *Chief Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*

No. 00-3613

PRAVIN SANGHVI, M.D.,

Plaintiff-Appellant,

v.

ST. CATHERINE'S HOSPITAL, INC., f/k/a LAKESHORE HEALTH SYSTEMS, INC. and ST. MARY MEDICAL CENTER, INC.,

Defendants-Appellees.

Appendix C

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. 98 C 202

Theresa L. Springmann,
Magistrate Judge.

ORDER

On July 17, 2001, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the judges in active service have requested a vote on the panel for rehearing en banc. The petition is therefore DENIED.